

Analogy of Law in Tax Law Regulation of Economic Relations Based on the Supply Chain Management

Viktor Alekseevich Mikryukov

Entrepreneurial and Corporate Law Department of Kutafin Moscow State Law University (MSAL), Candidate of Legal Sciences. Bld. 9, Sadovaya-Kudrinskaya Str., Moscow, Russia, 125993.

¹*mikryukov.viktor@yandex.ru*

Abstract-The relevance is due to the variability and incompleteness of modern tax legislation, which results in increased attention to the problems of applying tax rules with the use of analogy as a key technique for overcoming legal lacunae. The objective is to enhance the development of the doctrinal frameworks for the practice of applying the analogy of law and to identify the peculiarities of the implementation of this tool in the area of tax. The methodological framework involves general scientific (analysis and synthesis, abstraction and concretization) and special research methods (comparative legal, formal legal, technical legal, teleological). The method of analogy is both the key tool and the object of study. Arguments are presented supporting the suitability of the method of analogy for use in tax law. The application of tax legislation by analogy has been substantiated to not only permissible, but also necessary for the proper protection of taxpayers' rights and counteracting infringement of fiscal interests. The necessity of introducing measures of deterrence of law enforcer's discretion when using the analogy in the impact of tax law is revealed. The arguments against the direct regulatory legalization of the analogy in the tax law are presented. The work contributes to the enhancement of the general doctrinal provisions on the application of the analogy of law and serves as the basis for creating special parameters for applying this tool in taxation.

Key words- taxation, legal gap, analogy of law, tax law, supply chain management, discretion.

1. Introduction

Analogy is one of the oldest universal human thought tools intended to compensate for the lack of information, and in legal terms it is one of the traditional means aimed at overcoming legal vagueness and meeting the gap in rules capable of resolving new or abnormal (unknown to existing norms) social relations involved into the sphere of legal effect. Analogy is very often used to facilitate understanding and to substantiate one's point of view in everyday discourse [1]. It is considered that arguments by analogy are most characteristic of legal reasoning, since the use of analogies makes the law more

reproducible than it otherwise would be, and it allows lawyers to more accurately predict how a particular situation will be dealt with by law [2]. Since for tax law regulation of economic activities based on the principle of certainty of taxation, the completeness of regulation (no lack of information on the procedure for regulating each legally significant situation) is of particular (constitutionally significant) value [3], and absolute (full) tax certainty is an unachievable goal [4], especially in the context of tax reforms, so it seems extremely important to have clear legislative parameters, conditions and sector-specific limits of use of analogy in tax law – the application referred to relations within the scope of tax legislation, but not directly regulated by the law or other normative act provided for by it, of existing tax law and rules that are intended to regulate relations similar to loopholes in the law. Admittedly, the state of uncertainty in tax administration in a particular case, as in the practice of tax administration as a whole, can not only lead to an imbalance in the interests of individuals (taxpayers) subject to equal protection, who are forced to obey the authorities in the field of tax introduction and levying, in the process of implementation of tax control and tax liability, and the interests of the state, whose very existence depends largely on the completeness of tax collection, but also cause economic distortions, unequal and unfair tax burden. At the same time, the tax legislation in Russia does not only fail to define the essential and methodological framework necessary for the consistent and uniform application of the legal analogy when detecting tax and legal anomalies, forcing court practice to “deal with the incompleteness of legal regulation by trial and error” [5], but does not reply directly to the question about the lawfulness or inadmissibility of applying the analogy of law in order to overcome legal gaps in the field of taxation. In the Tax Code of the Russian Federation (hereinafter – the Tax Code of the RF), although there is no special prohibition on the use of tax law by analogy, as it is done in Cl. 2 of Art. 3 of the Criminal Code of the RF in clarifying the principle of the legality while determining the criminality of acts and their punish

ability, but at the same time there are no norms similar to the rules of Cl. 1 of Art. 6 of the Civil Code of the RF, Art. 5 of the Family Code of the RF and Cl. 1 of Art. 7 of the Housing Code of the RF, defining the conditions and principles of the possible (ad hoc sanctioned) implementation of legislation by analogy in the relevant segments of legal life, which are outside the purview of the legislature. These circumstances actualize the scientific analysis of the theory and practice of using the analogy in the law in tax law regulation of economic activity, including setting the urgent task of doctrinal assessment of the possibility, expediency or even the need for direct legislative legalization of the legal mechanism of analogy in tax law.

2. Literature Review

Difficulties in determining the theoretical foundations and practical features of the operation of analogy method in the field of taxation entail not only failure to mention the tax law relating to this issue, but also the general cautious (if not wary) attitude of lawyers to the use of analogy in public law [6,7,8]. And not only criminal and administrative law, but also tax law are among those (public) industries where usually the acceptability of the analogy in the law is rejected (by the law itself or the unanimous attitude of judges and scholars) (https://en.wikipedia.org/wiki/Analogy#Restrictions_on_the_use_of_analogy_in_law). Some tax experts, with references to the normative postulates “everyone should pay only legally established taxes” (Article 57 of the Constitution of the RF, cl. 1 of Art. 3 of the RF Tax Code), “no one can be obliged to pay taxes and fees, as well as other contributions and payments that have signs of taxes or fees that are not provided for by the RF Tax Code or established in a different order than that defined by this Code” (cl. 5 of Article 3 of the Tax Code), “acts of legislation on taxes and fees should be formulated in such a way that everyone knows exactly what taxes, when and in what order he must pay” (cl. 6, Art. 3 of the RF Tax Code) declare an analogy in the field of taxation “out of the law” [9], completely rejecting the possibility of applying this method to overcome the uncertainty in tax law [10]. In such cases, it has traditionally been underlined that in tax law, as in one of the branches of public law (as opposed to private law), law enforcers should not be given the authority to fill the legal gaps using such techniques as analogy of law or legislation. The denial of the applicability of the analogy of law in the taxation mechanism is superimposed on the general perception of the legal analogy widely used in modern literature as an undesirable, redundant and worst tool suitable for use in legal effect only as a last resort [11], if other methods did not clarify [12] (regardless of the

private or public nature of the legal relationship to be regulated), since how to use an analogy is usually “poorly taught and poorly practiced” [13], and the analogy itself is “an extremely controversial and complex form of reasoning” [14], and as a rule, “does not cover all the situation as a whole and raises additional issues” [15]. It is noted, in particular, that, using the analogy in authorized cases, judges themselves acknowledge the inferiority and institutional limitations of the arguments based on this technique [16]. According to some legal experts, the application of the law by analogy is not allowed by default and requires legal authorization [17]. In the field of taxation, such an assessment leads to an opinion that the use of the analogy of law while regulating tax relations is sometimes permissible, but being closely associated with emerging doubts, ambiguities and contradictions, it is always a forced measure, an exception to the general rule [18]. The negative attitude towards analogy of law is also associated with an important element of discretion, which the analogy introduces into the mechanism of legal regulation. So, one cannot but agree that in the condition so flegalun certainty, the use of analogy as a whole is one of the forms of exercising is certiorari powers [19], because the subjects of law enforcement are forced to search for applicable rules, compare legal gaps and prescribed legal relations, check the inconsistency of the norms applied by analogy to the substance of disputed relations and monitor the implementation of the main principles of the relevant branch of law, considering personal ideas about analogy and conformity, which naturally enhances their discretionary capabilities. This often provides the grounds to consider analogous reasoning no more than a “mask for unrecognized judicial lawmaking” [20], despite the fact that currently “neither the Russian legal mentality nor the level of law enforcers’ professionalism can cope with the extent of freedom provided by analogy” [21]. In addition, although discretionary powers are defined by law and provide for the legal right to choose behavior [22], they also give tax authorities some freedom, which in some cases borders on arbitrariness, which leads to an unjustified expansion of discretion and violation of the principles of competence, responsibility and compliance with professional conduct [23]. Indeed, the distortion of the principle of social justice is caused not only by the absence of legal norms capable of fixing existing economic relations, but also by the discretion of law enforcers who are forced to fill loopholes in the law [24]. With regard to tax law regulation in economic activity, the intensity of negative coloring of analogy as a method related to discretion increases, since “among various executive branches of state regulation it is in the field of taxation that the use of discretionary powers by tax authorities generates the strongest

feelings and complaints among taxpayers” [25], and if enforcement discretion is acceptable, in principle, in tax law, it is necessary to determine the system of measures for limiting it in the clearest possible way [26].

3. Materials and Methods

The methodological basis of the presented research consists of general scientific (analysis and synthesis, abstraction and concretization) and particular scientific (special) research methods (comparative legal, formal legal, technical legal and teleological interpretation). The leading scientific tool and at the same time the object of research is the method of legal analogy. To achieve the defined objectives of the research, it was necessary to analyze the doctrinal attitudes of Russian and foreign lawyers on issues of motives, reasons, positive and negative aspects of the actual use of the analogy of law in the field of taxation. The regulatory framework of the study includes the provisions of the Russian tax legislation enshrined in the Tax Code of the RF (part one of July 31, 1998 No. 146-FZ, part two of August 5, 2000 No. 117-FZ), in the context of this study the most important of which are the foundations (principles) of the Russian legislation on taxes and fees, as well as the norms applied by analogy in actual practice. Since the institute of analogy itself cannot exist only in theoretical structures, it “comes to life” in direct law enforcement and is revealed through the prism of practice, the creation of this article required a broad empirical basis, represented by a number of specific judicial acts containing a legal assessment of the legal gaps discovered in tax legislation and related with courts arguing for a positive or negative attitude towards the possibility of using the analogy method to resolve a dispute.

4. Results

The basic result of this research is the argumentation of increasing the relevance of the scientific elaboration of the theory and practice related to using the analogy of law in modern tax regulation of economic activity. The reasons for the complete denial or assertion of the limited applicability of analogy of law in the taxation mechanism by scientists and legal practitioners have been revealed. Despite the public, administrative and authoritative nature of the legal impact in the tax regulation sphere, it has been theoretically justified and confirmed as exemplified with specific practical cases that such a manifestation of the implementation of analogy method in the law, as the application of tax legislation by analogy, is not only admissible but necessary. The analogy of law in tax regulations is proposed (subject to the necessary conditions and limits) as lawful by default. The reasonableness of this

conclusion is highlighted by the dramatically negative assessment found in the doctrine of a special regulatory prohibition on the use of analogy in the taxation mechanism established by the legislation of the Republic of Belarus. It has been determined that the system of limits for the use of tax legislation by analogy noted in science can be expressed by two fundamental principles: the “*nullumtributum sine lege*” and the “*nullumpoena sine lege*”. The particular examples show the perception and effective observance of these limits in judicial practice. As an additional limit to the tax analogy in the tax regulation impact, it is proposed to consider the need to link each case of application of the tax law by analogy to the restriction of discretion of the law enforcer. The idea of the need to secure the requirement for profound motivation by courts to use the analogy of law while resolving tax disputes at the level of an appropriate clarification of the Plenum of the Supreme Court of the RF was put forward. Establishing such requirements will not only limit the excessive discretion implemented within the framework of analogy and create a basis for monitoring the observance of analogy limits, but also relieve the legislator from the need to formulate and enshrine rules directly admitting the law in the Tax Code of the RF.

5. Discussion

The lack of direct substantive legalization of the tax analogy along with the aforesaid doctrinal positions in Russian realities led to the emergence of judicial acts indicating that the tax legislation “does not provide for opportunities” and even tougher – “does not allow” the application of the law by analogy (see, for instance: Cl. 7, Information Letter of Presidium of the Supreme Court of Arbitration of the RF of May 31, 1999 No. 41 “Review of the Practice of Applying the Law Regulating the Specifics of Banks’ Taxation by Arbitration Courts”; Resolution of the Federal Antimonopoly Service in the Volga-Vyatsky District of August 1, 2000 No. A43-1302/00-32-88; Decision of the Supreme Arbitration Court of the RF of January 26, 2005 No. 16141/04). In Ruling of March 13, 2003 No. F08-693/2003-259A, the FAC of the North Caucasus District drew the attention of lower courts to the fallacy of the statement that similar functions performed by the public movement employees (a taxpayer in a disputable legal relationship) and lawyers in the procedural representation of individuals in court (the provision of legal services to citizens on a reimbursable basis) give this social movement the right to pay taxes by analogy of law in the same tax regime that is established for bar associations. At the same time, the cassation court clarified that the tax legislation does not contain rules that allow the application of law by analogy. In another case, faced with a gap in regulating the procedure and

determining cases of granting deferral (installment plan) of arrears in insurance premiums (corresponding to penalties and fines), courts of first, appellate and cassation instances when meeting the applicant's requirements for granting deferral of insurance contributions in compulsory pension insurance and compulsory health insurance due to the fact that the applicant was in a difficult financial situation, proceeded from the fact that the absence in the legislation of the mechanism regulating the organization of work on granting a deferment (installment plan) to pay these fees cannot be a basis for violating the applicant's right to timely review his application for deferral (installment plan) and to a substantiated response. At the same time, the courts substantiated their position by the possibility of applying, by analogy, the norms of the Tax Code of the RF, establishing the rules and grounds for changing the deadlines for procedure of taxes payment (Chapter 9 of the Tax Code of the RF) to the controversial legal relations, because of the similarity of legal relations in paying taxes and contributing insurance premiums, as well as with the absence of a direct legislative ban on such an analogy. However, the Presidium of the Supreme Court of Arbitration of RF did not support the mentioned approach of the lower courts, stated that such analogies were unacceptable and indicated that in the absence of direct legislative permission from the monitoring bodies there are no grounds for granting a deferral (installment plan) for repayment of insurance premiums (see: Ruling of the Presidium of the Supreme Arbitration Court of the RF of April 16, 2013 No. 16929/12). Noteworthy is that the FAC of the Moscow District in Decision No. KA-A40/2508-07 of April 10, 2007, considering the taxpayer's dispute with the tax authority regarding the legality of applying VAT deductions, rejected the reference of the tax authority to Cl. 1 of Art. 374 of the Tax Code, which determines the object of taxation on property of organizations. Not considering permissible the use of the norms establishing certain elements of a specific tax in relation to other taxes, the court additionally referred to the absence in the Tax Code of provisions on the application of the analogy of law. Considering another controversial situation related to the gap in tax law, the FAC of the Ural district stated in the Decision of July 29, 2002 No. F09-1549/02-AK that the analogy in tax legislation is not applicable and refused to apply the provisions of Art. 69 of the RF Tax Code, establishing the procedure for drawing up and sending tax claims, for an analogy, to partially unresolved relations, referring to the tax authorities' requirements for the taxpayer to provide documents of accounting and tax accounting. Among similar (denying the legitimacy of analogy of law in the field of taxation) acts,

attention should be paid to the recent Decision of the Supreme Court of the RF of December 26, 2017 (approved by the Presidium of the Supreme Court of the RF on March 28, 2018), mentioned in the "Review of the judicial practice of the Supreme Court of the Russian Federation No. 1 (2018)", with regard to case No. 305-KG17-12383, in which the court rather unequivocally formulated a position, by virtue of which, considering the principle of formal certainty of norms common for all obligatory payments enshrined in Cl. 6 of Art. 3 of the Tax Code of the RF, the procedure for calculating the utilization fee and the corresponding duties of the payers of this fee (all essential elements of the legal structure of tax collection, including its base rate and calculation procedure, must be established by law and regulations adopted in accordance with it, and the identification of these elements and duties of tax payers in law enforcement corresponding to them, as well as filling the gaps in the order of calculating the fee by analogy, cannot be considered legitimate) cannot be established by applying the rules of law by analogy. Due to the circumstances of the mentioned case, the owner of foreign-made self-propelled loaders liable to the utilization collection in the absence of a regulatory definition of the "maximum technically permissible mass" for self-propelled machines submitted to the customs authority a calculation of the fee, laying the loader's structural weight determined by its maker as the basis for determining its size. The customs authority found it necessary to use by analogy the rules of the Technical Regulations of the Customs Union "On the safety of wheeled vehicles", approved by the Decision of the Commission of the Customs Union dated December 9, 2001 No. 877, according to which the technically permissible maximum mass of a wheeled vehicle is determined, i.e. the maximum mass of a vehicle with equipment, passengers and cargo specified by the manufacturer. Based on this, in the opinion of the customs authority (supported by the courts of first, appellate and cassation instances), when calculating the utilization fee for loaders, in addition to the design weight, the load capacity of loaders should be taken into account, i.e. the maximum technically permissible weight of the loader should be the sum of the mass of the self-propelled machine and its carrying capacity, and with such a calculation of the collection, its value for each loader should be twice (not the single one applied by the collection payer) the size of the base rate. However, the Supreme Court of the RF, denying the admissibility of analogy of law in this case, pointed out that if there is uncertainty in the legal regulation, such discretionary (through analogy) law enforcement is illegal and leads to an increase in the fiscal burden. Following this logic, it is indeed possible to conclude that the use of analogy in tax

regulation of economic relations is prohibited pursuant to the general rule, but allowed only as a special sort or only in specially specified cases, in particular, when the legislator establishes the rule intended to regulate specific relations, and he himself indicates that other (similar) relations are to be settled “in a similar way” (for instance, according to Cl. 3, Art. 58 of the Tax Code of the RF, the payment of advance payments of tax during the tax period may be provided, while the obligation to make advance payments shall be deemed executed in a way similar to the payment of tax; in accordance with Cl. 1, Art. 156 of the Tax Code of the RF, taxpayers, when doing business in the interests of another person, on the basis of mandate agreements, commission agreements or agency agreements, determine the tax base as the amount of income received by them as remuneration (any other income) when performing any of the specified agreements, and in a similar way the tax base is determined when the pledgee sells the subject of the unclaimed pledge owned by the pledger in accordance with the procedure established by the legislation of the RF). Following this logic there is a scientific approach, according to which although the overcoming of loopholes in legal regulation of tax duties of participants in economic relations by judiciary is permissible, but cannot occur as a regular activity and should be related to “exceptional acts” [27]. At the same time, it seems true that the achievement of absolute lack of gaps in the law is almost impossible due to the dynamism and variability of actual relations that constantly require modernization of the regulatory framework [28]. Even the most accurate rule is potentially inaccurate “due to our imperfect knowledge of the world and our limited ability to foresee the future”, the most accurate term can be vague when we encounter a case that is not expected (unforeseen) while defining this term [29]. Therefore, it is possible to support the opinion that a complete ban (including a ban by default – *auth.*) on the application of tax legislation by analogy would make it impossible to exercise a number of rights granted to taxpayers by the Tax Code of the RF, and would in fact paralyze the activities of tax authorities [30]. Indeed, the interests of taxpayers and the opposing fiscal and controlling interests of public authority are so diverse that many of them are “not formalized and exist outside the framework of law on taxes and fees” [31]. It is also true that the idea of eradication of discretion is utopian in its essence, justice is not only a form of enforcement, but permeated by discretionary principles, and the risk of abuse by the courts or tax authorities which is predetermined by using the analogy method by discretion is not a reason or justification for completely refusing to use this method, for it is known that “*abusus non tollitur*” (an abuse does not remove the use). Since gaps in the legal

regulation of economic activity is an inevitable phenomenon, the positive potential of the analogy should not be ignored as applied to the tax segment of regulation of legal relations, having in mind that in Russian and foreign literature (despite some doubts and fears) this potential is generally considered the oldest, habitual and effective means of overcoming legal uncertainty, keeping the regulatory impact within the principle of the equality of everyone before the law and being able to effectively work in the regulation of both horizontal and vertical economic relations. The analogy is generally immanent in thinking, everyday practical and theoretical reasoning, and it plays a significant role in the law in promoting doctrinal stability and systemic consistency, creates the principle of reproducibility of the way to reach a legal objective and, therefore, predictability of legal planning. It is necessary to consider the fact that the method of analogy in taxation can play a positive role among the tools that mediate the suppression of taxpayers’ actions aimed at illegally reducing the tax burden or evading taxes.

It is appropriate to recall here that in procedural acts regulating the procedure for courts to overcome legal gaps through the application of legislation by analogy (Cl. 6, Art. 15 of the Code of Administrative Judicial Procedure of the RF, Cl. 6, Art. 13 of the Code of Arbitration Procedure of the RF, Cl. 3, Art. 11 of the Civil Procedure Code of the RF), any exemptions related to the consideration of tax disputes are not provided. In addition, the legal position of the Constitutional Court of the RF should be taken into account, according to which the gap in legal regulation, which remains as a result of the inaction of state authorities (authorized and obliged to eliminate such a gap) for a long time sufficient to eliminate it, cannot serve as an insurmountable obstacle to controversial issues, if the implementation of the rights and legitimate interests of citizens arising from the Constitution of the RF depends on it (Definition of April 9, 2002 No. 68-O). In view of the foregoing, it seems quite logical and natural that the negative scientific assessment of the introduction of analogy in tax regulation, cited above, does not prevail in the literature review, and the law-enforcement positions based on it remained few. In real practice, the approach that analogy of law, being a universal (general legal) means of casual overcoming legal gaps and not only possible but necessary in tax law, has become essentially common and doctrinal confirmed, and a general ban on tax analogy, serving as one of the main means of maintaining consistency in the tax mechanism is unacceptable. At the same time, it is predicted that in the future, the value of judicial practice in tax disputes (in the context of the situational

replenishment of legal gaps) will increase. A textbook example of an adequate (contributing not only to resolving a specific tax dispute, but also encouraging the legislator to improve the Tax Code of the RF) application of analogy in the law in tax law regulation is how the courts, faced with the lack of a statutory regulated procedure for offsetting and refund of excessively imposed fines, allowed the use of the provisions of Art. 79 of the Tax Code of the RF referring to the relevant relations. Earlier (before making changes to this Article on the basis of established practice), due to the literal interpretation, it intended only for regulating the issues of offsetting and returning overly collected taxes, fees and penalties, but not determining the procedure for offsetting and returning a fine. In particular, the FAC of the Moscow District in its Ruling No. KA-A40/5108-08 of June 18, 2008 did not take into account the argument of the tax authority about the non-use of Art. 79 of the RF Tax Code in the framework of the dispute on fine reimbursement, noting that the legislator did not specifically prohibit the application of the procedure provided for in Art. 79 of RF Tax Code to the procedure for offsetting and refund of an excessively collected fine, the absence in the Tax Code of the RF of a procedure for offsetting and refund of an excessively collected fine cannot serve as a basis for maintaining the disputed amount in the budget, and therefore the provisions of Art. 79 of the RF Tax Code can be applied in appropriate cases by analogy in the law. The practice of using the provisions of Art. 78 of the Tax Code of the RF for an analogy deserves to be supported. These provisions regulate the procedure for the return of taxes when resolving disputes related to the accrual and collection from the tax authority of interest at the rate of the Central Bank of the RF, charged in case of violation by the tax authority of Art. 176 of the RF Tax Code for the default on payment refund of VAT paid to suppliers of goods, works, services purchased in the territory of the RF (including cases of unlawful refusal to apply tax deductions for the amount of such tax). In particular, the FAC of the North-West District stated in the Rulings of February 10, 2003 No. A52/2603/2002/2 and of October 14, 2002 No. A52/1297/2002/2 that the absence of the procedure for calculating interest for late payment of VAT (i.e., there is a gap as to which body and in what order should charge and pay) in Art. 176 of the Tax Code, cannot be an obstacle to the realization of the payer's right to receive the specified interest. The court also clarified that the Tax Code of the RF does not contain any special restrictions on the application of this norm for an analogy when considering claims of tax payers to the tax authorities.

A very indicative case of applying the tax analogy is an example of a casual defining of the notion of a legal

term predetermining the assessment of the legality of the taxpayer's choice of the zero rate of VAT for services related to the export of goods. Faced with the fact that Cl. 2.5, Art. 164 of the Tax Code of the RF, relating works (services) performed (rendered) by Russian organizations (other than pipeline transportation organizations) in sea and river ports for transshipment of goods moved across the border of the RF to the number of operations subject to zero rate of VAT, does not define the notion of the term "transshipment", the Arbitration Court of the North-Caucasus District in Ruling No. F08-378/2015 of March 13, 2015 considered it possible and necessary to be guided by analogy with other norms of tax legislation regulating homogeneous (similar) legal relations with the participation of pipeline transportation organizations (sub-sub-cl.4 of sub-clause 2.2 of Cl. 1 Tax Code of the RF), and defines "transshipment" as "loading, unloading, discharge, filling, labeling, sorting, packaging, moving within the boundaries of the sea, river port, technological stockpiles of cargo, bringing cargo into transportable condition, their fastening and separation". Based on this understanding of the term "transshipment", the court admitted grounded the use by the taxpayer of a zero tax rate for services rendered, albeit outside the port area, but using a special terminal designed to receive, temporarily store, accumulate shipload of greasers and send them to port.

The judicial approach to overcoming the gap in regulating the issue of the term during which the taxpayer is entitled to submit an application for offsetting overpaid taxes and fees (overpayments) against future payments (until recent changes, Art. 78 of the Tax Code of the RF determined only the limitation period for application for the return of the relevant amounts, leaving the outlined question open). Based on the fact that the deadline for filing an application for offsetting tax overpayment in the Tax Code of the RF has not been established, and considering that offsetting and refund of overpaid and overcharged taxes are independent ways of restoring the taxpayer's property status violated by overpayment or collection, it would be possible to allow for submitting an application for offsetting beyond the time limit set for filing a claim for return. However, the Presidium of the Supreme Arbitration Court of the RF in Ruling No. 5735/05 of August 23, 2005 set up the position that there are no significant differences in their economic content between offset and refund of tax payments, and in fact (because of this similarity), offsetting overpaid tax amounts is a type (form) of the return of these amounts, the restoration of the taxpayer's property status. Because of this, applying the three-year deadline for filing an application for return by analogy, the Presidium of the Supreme

Arbitration Court of the RF supported the position of the tax authority and upheld the latter's decision to refuse to offset overpayment due to a taxpayer's skipping of the specified three-year period. This law enforcement position is remarkable in that the case was resolved in favor of the tax authority, contrary to the interests of the taxpayer.

The above special cases clearly demonstrate that the analogy of law in the general legal sense and in relation to taxation is a legitimate and socially positive means. At the same time, these examples refute the idea existing in science about the restraint of analogy practice in tax law by the procedural sphere (the ability of the analogy to overcome exclusively procedural gaps) and the tendency to protect taxpayers' interests (the justification of the analogy just in cases when protecting taxpayers' interests) [12]. That is, the analogy in tax law not only acts as a means of ensuring the taxpayer's legitimate interests, adapting suitable protective tools to abnormal situations, but also contributes to filling the state budget, struggling with unreasonable withdrawal from tax duties.

Thus, it can be concluded that, in tax laws, despite the public, administrative and authoritative nature of the legal impact, such kind of the work of analogy, as the use of tax legislation by analogy, is quite common, since, on the one hand, it is necessary and inevitable and, on the other hand, legitimate by default.

Confirmation of accuracy of such a conclusion can also be seen in sharply negative assessment in science terms of the direct regulatory ban on the use of tax law by analogy, established in the legislation of the Republic of Belarus (Cl. 7, Art. 3 of the Tax Code of the Republic of Belarus of December 19, 2002, No. 166-3). This prohibition is considered "absolutely unreasonable" and having "an extremely limited scientific potential, which in no way can be considered systemic".

It should be certainly borne in mind that, in general, just as analogy of law cannot be limitless, so in tax laws, a number of limits must be observed, including industry specifics. With a view to the generally accepted rule in science about the inadmissibility of the application by analogy of norms that establish the consequences of their actions (inaction) that are unfavorable for subjects of law, considering the principle of legality and certainty of taxation, the right to the tax analogy should be denied in situations when it comes to the sphere of introduction (establishment) of taxes and fees, the definition of elements of taxation, the qualification of the elements of the tax offense and the application of measures of tax law responsibility. These general limits of analogy in the law in tax law quite clearly and fully express two well-known maxims: the "nullum tributum sine lege" and "the nullum poena sine lege". Indeed, there is a consensus in

science that judges do not have the right to spread their authority beyond the law by analogy, that applying the analogy in tax liability would violate the general legal principles of clarity and certainty of regulatory regime and that, in general, analogy in tax law cannot be used by tax authorities as a means of restricting and suppressing taxpayer's rights [18].

The proper perception of the specified limits of the analogy in tax law regulation is reflected in judicial practice. Thus, in Decision No. 2742/03 of 14 May 2003 of the Supreme Arbitration Court of the RF, it was flatly stated that filling the gap in the law by applying an analogy with respect to the subject and elements of the tax liability (in the controversial case, it was an attempt to spread the procedure of contributing the amount of income tax to the budget for organizations that are not payers of income tax because they have privileges and do not have a tax base for calculating the tax, in particular, organizations of persons with disabilities), is "unacceptable from the point of view of the concept of the lawfully established law. The Ruling of the FAC of the West Siberian District of May 23, 2005 No. F04-3146/2005 (11503-A45-40) unequivocally determined that, in the absence of a direct indication in the law, when calculating the profit tax of organizations, it is illegal to use the norms of Ch. 21 of the TC RF on VAT and determine the income of the borrower of promissory notes in the form of savings on interest.

The FAC of the East-Siberian District spoke no less clearly, stating that the use of analogy in regulating tax relations associated with establishing the basic elements of taxation, including the deadline for tax payment, is not allowed, considering the constitutional principle of legal establishment of taxes and fees, and therefore the court in a particular situation, having discovered the absence of a statutory deadline for paying road user tax, refused to the tax authority the right to determine this period by analogy and recognized calculation of penalties for late payment of tax as inappropriate (Ruling of October 24, 2002 No. A19-12887/01-15-32-F02-3122/02-C1). The courts have a strong position with regard to the fact that the application of a tax sanction established for a different (not identical to controversial) set of elements of a tax offense, although similar for a number of elements, is not provided by the law, and therefore is not permissible (Ruling of FAC of the West Siberian District of January 12, 2006 No. F04-9373/2005 (18371-A45-25)). The idea of the inapplicability of the analogy in the mechanism for engaging to tax liability is very clearly demonstrated in the Ruling of the Arbitration Court of the Moscow District of May 19, 2016 No. F05-5884/2016, where the court rejected the applicant's arguments about the possibility of applying the provisions of the Tax Code of the RF when

establishing the fact of interdependence and affiliation, since otherwise would contradict the constitutional principles of legal liability, which, along with the requirements of Art. 54 of the Constitution of the RF also include the principles of legal certainty and proportionality of responsibility.

Since analogy in tax law did not receive special substantive legal permission and, as was shown, the actual use of analogy is a manifestation of discretionary enforcement powers, it can be supported also in relation to Russian realities that it is necessary to exert particular vigilance with regard to the fact that discretionary powers did not gradually move to the area of means of receiving state revenues without sufficient grounds and at the expense of traditional values of the rule of law. In other words, an additional limit to the permissible implementation of the method of analogy in the tax law regulation of economic relations should be considered the need to pair the analogy with the restriction (restraint) of discretion inherent in this method.

The scientific point of view was expressed that the conditions, limits and rules for applying analogy of law and analogy in justice in taxation need official legalization (legislatively fixed directly in the Tax Code of the RF). According to some legal scholars, the special significance of the analogy in resolving tax disputes, as well as the need to counter possible abuses in its application, “strongly demand” the inclusion of a rule on the mechanism under consideration in the Tax Code of the RF (we mean a rule that would give definition of analogy, consolidated the grounds for its use and limits of application) [32].

On the one hand, the idea to provide the law enforcer with legislative guidelines, which, by applying tax rules by analogy, would allow each time keeping within the framework of the basic principles of tax legislation, looks quite reasonable. But on the other hand, without a proper doctrinal and methodological basis, apart from the accumulated and thoroughly analyzed positive and negative experience of actual practical use of the analogy in resolving tax disputes (or refusing to use this technique), the proposed legislative guidelines can be only general and overlapping known theoretical postulates about the essence, conditions and limits of the application of analogy of law and virtually useless. Moreover, if now (in the context of failure to mention the law on the admissibility of tax legislation by analogy) every case when the courts resort to this method of overcoming gaps in tax law is associated with serious doubts and reflections, then if there is a direct authorization by the legislator, the courts’ appeal to analogy can become ubiquitous, poorly controlled and risks becoming a means of arguing and legalizing law enforcement arbitrariness. In other words,

at presentsuchincentivestoactivelyapplytheanalogyintax relationscanbedangerous.

To provide an opportunity to control and, if necessary, qualitatively challenge the results of such analogous enforcement in the tax area, which goes beyond the allowable, considering the need to minimize the possible negative effects of discretionary powers of the courts, it is extremely important not only to insist on complying with the above mentioned analogies, but also require justification of the presence of the necessary prerequisites (conditions) and the absence of obstacles to the use of analogy. The courts should, through the prism of the circumstances of a particular tax dispute, reflect in as much detail as possible the rules for applying the law by analogy, developed in the theory of law, and specifically: indicate the presence of a gap, substantiate the real (rather than seeming) nature of the gap, reveal the applied criteria of similarity in finding properly regulated relationships similar to the gaps, show the necessary and sufficient depth of the analogy, prove the conformity of the act adopted by analogy to the basic principles of tax legislation to confirm that the application of a particular rule by analogy does not conflict with the legal nature of the disputed legal relationship and does not distort the essence of the rule applied. The formal preservation of such a requirement, as well as the presentation of the methodological recommendations for its implementation, seems to be carried out properly by adopting an appropriate resolution of the Plenum of the Supreme Court of the RF.

6. Conclusions

Thus, we can conclude that analogy of law as a way to overcome the incompleteness of legislation and achieve legal certainty is not at all alien and a priori negative element in the mechanism of tax regulation of economic activity. It has been substantiated that, despite being justifiability of a cautious attitude to the intensive use of the instrument under investigation in public branches of law, including taxation, the reticence of the Russian legislator on the presence or absence of the possibility to fill gaps in tax law by analogy should be considered as a tacit consent of it. A different approach, on the one hand, would prevent proper protection of taxpayers’ interests, and on the other, would weaken the stability of the tax system and reduce the degree of protection of the treasury from the negative consequences of tax evasion. The analysis of judicial practice based on the denial of the applicability of analogy in tax law allowed us emphasizing that the instrument in question cannot and should not be applied in the field of taxation every where. Immediate over coming of gaps in tax law by means of analogy is admissible upon occurrence of certain conditions (the presence of an actual gap, sufficient similarity of the

gap and legal relations, non-contradiction of the applicable rule to the essence of the gap relationship) and being subject to special limits (the inadmissibility of applying the analogy for establishing taxes and their elements, the failure to use analogies to determine tax offenses and bring violators to tax liability). Supporting the idea that, on the whole, the analogy of law in tax relations cannot be used by tax authorities as a means of restricting rights and suppressing taxpayer's economic freedoms, did not prevent from noting the existence of adequate, positive judicial practice of applying tax rules not only in favor of the taxpayer, but also in defense budget interests. Since the analogy of law inevitably causes an increase in the degree of discretion of the law enforcer (when qualifying a legal gap, when establishing criteria for the similarity of gap and legal relations, when determining whether the substance of the disputed relations corresponds to the legal nature of the rules to be applied), that in the field of taxes is particularly sensitive to economic actors, so it is proposed to strive to create such conditions (rules) for the application of tax legislation by analogy, which would suggest adjunction of analogy with the restraint (restriction) of freedom of enforcement, which would prevent administrative or judicial arbitrariness. In this aspect, the basic rule for applying the tax analogy may be the requirement that courts comply with the mandatory reasoning for the presence of conditions and the absence of obstacles to the application of the analogy of law when resolving tax disputes in the context of incomplete legislation. Such a requirement, along with the basic generalizations of legally and economically adequate practice of actually using the method of analogy in tax and legal regulation, should be fixed at the level of the decision of the Plenum of the Supreme Court of the RF, which eliminates the need to formulate and enshrine rules in the Tax Code of the RF directly admitting the analogy of tax law. Only provided enhancing legal culture of subjects of tax interaction, sufficient scope of actual use, and as a result of accumulation of theoretical and methodological developments, uniting them into a single systematic block, the institute of analogy is able to receive tangible eligible reflection in TC of the RF.

Reference

- [1] Juthe, A. *Argument by analogy. Argumentation*. 19 (1). P. 1, 2005. DOI 10.1007/s10503-005-2314-9.
- [2] Lamond, G. Precedent and Analogy in Legal Reasoning. The Stanford Encyclopedia of Philosophy (Spring 2016 Edition), Edward N. Zalta (ed.). <https://plato.stanford.edu/archives/spr2016/entries/legal-reas-prec/>.
- [3] Saprykina I.A. *Legal facts and the principle of certainty in tax law*. Financial Law. No. 6. P. 34 – 38, 2013.
- [4] Pilipenko A.A. *Potential compatibility of tax uncertainty and tax risks*. Taxes (journal). No. 2. P. 23, 2013.
- [5] Demin A.V. The principle of certainty of taxation: monograph. M.: Statute, 368 p, 2015. Access from ATP Consultant Plus.
- [6] Gogin A.A. *Problems of legal liability in the field of insurance relations*. Lawyer. No. 2. P. 14 – 18, 2015.
- [7] Gusakov S.Yu. *Temporary restriction on the use of the special right by the debtor*. Practice of Enforcement Proceedings. No 2. P. 21 – 28, 2017.
- [8] Lushnikova M.V. *On the issue of optimization of inter-branch relations of tax law*. Taxes. No. 4. P. 13 – 16, 2017.
- [9] Ashomko T.A. *Analogy is outlaw. General Ledger [Glavnayakniga]*. No. 1. P. 52 – 55, 2010.
- [10] Ustyuzhanin V., Sapozhnikov S. *Appeal of decisions of peace justices: tax aspect*. Russian Justice. No. 11. P. 39 – 40, 2002.
- [11] Balashov A.N., Mishutina E.I. *Issues of the application of the analogy in law and the analogy of justice in civil proceedings*. Russian Justice. No. 10. P. 59 – 62, 2009.
- [12] Rusyaev N.A. *Analogy in the tax law of Russia*. Financial Law. No. 8. P. 22 – 24, 2007.
- [13] Hunter, D. *Teaching and Using Analogy in Law*. Journal of the Association of Legal Writing Directors, Vol. 2. P. 151, 2004. <https://ssrn.com/abstract=1089669>.
- [14] Macagno, F., Walton, D. *Argument from Analogy in Law, the Classical Tradition, and Recent Theories*. Philosophy and Rhetoric, Vol. 42. No. 2. P. 179, 2009. <https://ssrn.com/abstract=1742956>.
- [15] Mikhailova O.R. *Mandatory pre-trial procedures in tax disputes*. Your Tax Lawyer. No. 10. P. 4 – 9, 2008.
- [16] Shecaira, F.P. *Analogical arguments in ethics and law: A defence of a deductivist analysis*. Informal Logic. Vol. 33. № 3. P. 435, 2013. DOI: <https://doi.org/10.22329/il.v33i3.3778>.
- [17] Smirnov A.V. *Analogy of justice and analogy of law: criteria for admissibility*. ATP ConsultantPlus. 2009.
- [18] Pantyushov O.V. *Application of the analogy of law (justice) in tax disputes*. Lawyer. No. 9. P. 56 – 59, 2016.
- [19] Kirillova A.D. *The implementation of discretionary powers of law enforcers in the system of ways to overcome legal uncertainty*. The Bulletin of Omsk University. Series Law. No. 4 (53). Pp. 26 – 32, 2017. DOI 10.25513/1990-5173.2017.4.26-32.
- [20] Schauer, F., Spellman, B.A. *Analogy, Expertise, and Experience*. University of Chicago Law Review, Vol. 84, No. 1, 2017. <https://ssrn.com/abstract=3064100>.
- [21] Trubitsyna T.A. *Institute of analogy in Russian law. Law and Politics*. No. 1. P. 5 – 9, 2007.
- [22] Starykh Y.V. *Discretion in tax law* / ed. M.V. Karaseva. M.: Jurisprudence, P. 31, 37, 2007.

- [23] Vaymer E.V. Legal positions of the Constitutional Court of the Russian Federation regarding tax control. Constitutional and Municipal Law. No. 4. P. 53 – 57, 2018.
- [24] Vaipan V.A. *Gaps in the law as a factor distorting the principle of social justice in judicial practice*. Bulletin of Arbitration Practice. No. 5. P. 3 – 6, 2018.
- [25] Saleheen A.M. *The use of discretions in taxation: the case of VAT in Bangladesh*. E Journal of Tax Research. Vol. 11. № 1. P. 97, 2013. <https://www.business.unsw.edu.au/research/research-journals/atax-journal>.
- [26] Mikhailova O.R. *Methods to limit the discretion of the tax authorities in the implementation of tax control*. State and Law. No. 7. P. 90 – 96, 2005.
- [27] Kopina A.A. *The role of the court in determining the size of fiscal fees*. Judge. No. 6. P. 34 – 37, 2018.
- [28] Malushin A.A. *Constitutional and judicial lawmaking (rights establishment) in the Russian Federation as a special form of modern law making*. Russian Justice. No.10. P. 6 – 8, 2015.
- [29] Gribnau, H. *Soft Law and Taxation: The Case of the Netherlands*. Leg is prudence. Vol. 1. № 3. P. 317, (January 2, 2007). <https://ssrn.com/abstract=2445032>.
- [30] Maslov A.A. *Application of tax legislation by analogy*: October. *Tax Disputes: Theory and Practice*. No. 10. P. 8 – 12, 2003.
- [31] Yadrikhinsky S.A. *On the identity of the distinctness of taxpayers' legitimate interests*. Laws of Russia: Experience, Analysis, Practice. No. 9. P. 79 – 83, 2018.
- [32] Navid, Jalali Nezhad, Hossein, Jenaabadi. *Studying Effect of Communication Skills and Leadership Styles of Manager on Knowledge Management of Zahedan University of Medical Sciences*, Iran, UCT Journal of Management and Accounting Studies, Issue2, pp. 27-33, 2014.